

Original Filed  
March 29, 1999

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF CALIFORNIA

In re	)	Bankruptcy Case
	)	No. 3-86-03556TDM
ROBERT ANTHONY OGLE,	)	
	)	Chapter 7
Debtor.	)	
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ROBERT ANTHONY OGLE,	)	Adversary Proceeding
	)	No. 96-3374DM
Plaintiff,	)	
	)	
vs.	)	
	)	
JOHN MICHAEL SOBRATO, Conservator	)	
of the Estate of Ann Sobrato,	)	
	)	
Defendant.	)	
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MEMORANDUM DECISION

**I. Introduction**

This is an adversary proceeding which was brought by the debtor, Robert Anthony Ogle ("Debtor"), in which he invokes his 1992 discharge as the basis for a permanent injunction to prevent the prosecution of an action filed against him in the San Mateo County Superior Court ("the state court action") by the defendant, John Michael Sobrato ("Defendant"), conservator of the Estate of Ann Sobrato ("Conservatee" or "Ms. Sobrato"). There are currently two matters before the court. One is a motion to amend, filed by

1 the Debtor in which he seeks to amend his complaint to include  
2 allegations that the claims made against him in the state court  
3 action were discharged in 1992. The other is a motion for summary  
4 judgment filed by the Defendant in which he seeks an order that  
5 the claims in the state court action were excepted from discharge  
6 under 11 U.S.C. §§ 523(a)(3)(A) and (B)<sup>1</sup> because his predecessors  
7 were unscheduled creditors who had neither formal notice, nor  
8 actual knowledge of the Debtor's bankruptcy in time to file a  
9 nondischargeability complaint and a creditor's claim.<sup>2</sup>

10 A hearing on both motions was held on February 12, 1999.  
11 Dek Ketchum, Esq. and Jenny D. Smith, Esq. appeared on behalf of  
12 the Debtor; James H. Seymour, Esq. appeared on behalf of the  
13 Defendant. Having considered the motions, all papers filed herein  
14 in support and in opposition to them, and the arguments of  
15 counsel, for the reasons that follow, the Defendant's contentions  
16 concerning the fraud claims will be sustained.

17 The court will reserve ruling on the Debtor's motion to amend  
18 until it decides whether Lawrence P. Johnston, the Defendant's  
19 predecessor conservator ("the Defendant's predecessor"), had  
20 actual knowledge of Debtor's bankruptcy in time to file a  
21 creditor's claim with respect to the nonfraud claims before the  
22 July 20, 1990 bar date for such claims. If so, the nonfraud  
23 claims in the state court action were discharged.

24 The only potential evidence before the court on this issue  
25 consists communications involving the attorneys for the  
26 Conservatee and Defendant's predecessor. These communications  
27 (correspondence and notes) are now sealed in chambers until the  
28 parties can brief the issue of whether the attorney-client

1 privilege is applicable to such communications. If these  
2 communications do not show that the Defendant's predecessor had  
3 actual knowledge of the bankruptcy in time to file a claim, or if  
4 the privilege applies and the communications cannot be examined  
5 absent a waiver of privilege, then the court will deny the  
6 Debtor's motion to amend and deny injunctive relief against  
7 Defendant, permitting him to proceed with the state court action.  
8 This is necessary because as between the Debtor and the Defendant,  
9 it will be as though this bankruptcy never occurred. However, if  
10 the communications are not privileged and show that the  
11 Defendant's predecessor did have actual knowledge in time to file  
12 a creditor's claim for the nonfraud claims, then the court will  
13 exercise its discretion to hear the fraud claims<sup>3</sup> in this court  
14 and will permanently enjoin prosecution of the nonfraud claims.  
15 By doing so it will necessarily be rejecting Defendant's  
16 contentions that the commencement of this adversary proceeding was  
17 an improper attempt by Debtor to obtain the benefit of removing  
18 the state court action to this court beyond the time to do so.

## 19 **II. Facts**

### 20 **A. The State Court Action**

21 In July 1996, Defendant filed the state court action. In the  
22 action the Defendant seeks recovery from the Debtor for money paid  
23 by Ms. Sobrato to four individuals named the O'Donnells, and their  
24 partnership, Parallax Investments II (collectively "the  
25 O'Donnells"). This money was paid to the O'Donnells pursuant to  
26 an agreement ("the undertaking") by which Ms. Sobrato agreed to  
27 guarantee payment of a judgment that was entered against the  
28 Debtor in another state court suit filed against him by the

1 O'Donnells.

2 The state court complaint alleges causes of action against  
3 the Debtor for: (1) fraudulent procurement of the undertaking by  
4 affirmatively misrepresenting its nature; (2) fraudulent  
5 procurement of the undertaking by concealing its nature and taking  
6 undue advantage of the Conservatee's impaired mental capacity; and  
7 (3) reimbursement of sums paid and costs incurred by a surety  
8 pursuant to California Civil Code section 2847. Presumably, the  
9 facts underlying the fraud counts in the state court action would  
10 be used by the Defendant in this court to support a claim of  
11 nondischargeability of the fraud claims under §§ 523(a)2, 4 or 6,  
12 as necessary under § 523(a)(3)(B).

13 The Debtor did not answer the complaint in the state court  
14 action, but instead brought this adversary proceeding to enjoin  
15 its prosecution on the grounds that any claims asserted in the  
16 state court action were discharged in the Debtor's bankruptcy  
17 1992.

18  
19 **B. The Conservatorship**

20 On October 24, 1986, a voluntary petition for the  
21 appointment of a conservator of the estate of Ms. Sobrato was  
22 filed in the San Mateo Superior Court. On or around the same  
23 date, John A. Sobrato (the "original conservator") was appointed  
24 temporary conservator of Ms. Sobrato's estate. On November 17,  
25 1986, this appointment was made permanent. The conservatorship of  
26 Ms. Sobrato's estate has existed continuously from the date that  
27 the Defendant was appointed as the temporary conservator until the  
28 present. Defendant's predecessor replaced the original

1 conservator on March 29, 1990 and Defendant's predecessor was  
2 replaced by Defendant in April, 1992.

3       The order of conservatorship authorized the conservator to  
4 independently exercise certain powers, and to prosecute and/or  
5 defend five legal actions that were pending against the  
6 Conservatee as well as " . . . any other legal action commenced  
7 during the conservatorship . . . ." The order also expressly  
8 authorized the conservator to employ attorneys, and any other  
9 persons necessary to protect the Conservatee's interest in the  
10 legal matters. The order expressly reserved to Ms. Sobrato the  
11 power to manage certain of her assets. The order did not mention  
12 the Debtor, the O'Donnells or the undertaking. Nor did it  
13 specifically mention who was to manage any bankruptcy matters in  
14 which Ms. Sobrato may have an interest.

15       **A.     The Debtor's Bankruptcy**

16       On November 19, 1986, the Debtor and his wife filed a  
17 voluntary Chapter 7 bankruptcy in this court. The Debtor's  
18 initial bankruptcy schedules did not include Ms. Sobrato, the  
19 original conservator, Defendant or the Defendant's predecessor.  
20 On April 1, 1987, the Debtor filed amended schedules which listed  
21 Ms. Sobrato, but not the original conservator, Defendant or  
22 Defendant's predecessor. The deadline for filing  
23 nondischargeability actions was set for April 20, 1987. Because  
24 the case was originally a no asset case, no bar date was set for  
25 the filing of creditors' claims. Assets were eventually brought  
26 into the bankruptcy estate and thereafter the court set a July 20,  
27 1990 bar date for creditors' claims. Neither the original  
28 conservator, Defendant, the Defendant's predecessor, nor Ms.

1   Sobrato filed a nondischargeability complaint, nor did they file a  
2   creditor's claim. A discharge was granted in 1992.

3         In December, 1986 and January, 1987, well before the April  
4   20, 1987 bar date, the Debtor contends that Ms. Sobrato obtained  
5   actual knowledge of the Debtor's bankruptcy through a series of  
6   conversations with, and a letter from, him in which he advised her  
7   of his bankruptcy.<sup>4</sup> However, it is conceded by Debtor that the  
8   original conservator, Defendant and Defendant's predecessor had no  
9   actual knowledge of the Debtor's bankruptcy before the April 20,  
10  1987 bar date.

### 11   **III. Issue**

12         The only issue disposed of by this Memorandum Decision is  
13   whether, as a matter of law, actual knowledge by the Conservatee,  
14   Ms. Sobrato, is relevant in determining if a " . . . creditor had  
15   notice or actual knowledge . . . " of the Debtor's bankruptcy case  
16   under § 523(a)(3)(B) before the April 20, 1987 bar date for  
17   nondischargeability actions.

### 18   **IV. Discussion**

19         Under § 523(a)(3)(B) unscheduled debts of the kind specified  
20   in § 523(a)(2), (4) and (6) are generally excepted from discharge  
21   if not scheduled in time to permit a timely request for a  
22   determination of nondischargeability. However, § 523(a)(3)(B)  
23   contains an exception which applies in those cases where, despite  
24   being unscheduled, a creditor had notice or actual knowledge of  
25   the case in time to file such a request. If this exception  
26   applies, then any unscheduled debts of the kind listed above are  
27   discharged.

28         Debtor focuses on the phrase "actual knowledge". He contends

1 that the state court action must be enjoined and the fraud and the  
2 nonfraud claims determined to have been discharged because the  
3 Conservatee had actual knowledge of the his bankruptcy well before  
4 this date.<sup>5</sup> In support of his position he relies on the  
5 communications he says occurred between him and the Conservatee in  
6 December, 1996 and January, 1997.

7 The Defendant focuses on the term "creditor". He contends  
8 that any actual knowledge by the Conservatee is irrelevant in  
9 determining whether a creditor had actual knowledge of the  
10 bankruptcy case because, by virtue of the conservatorship, the  
11 conservator, not the Conservatee, was the creditor who must have  
12 had actual knowledge of the case before the § 523(a)(3)(B)  
13 exception applies.

14 The court agrees with the Defendant's characterization of the  
15 issue in this case. The question is whether the Conservatee or  
16 the conservator is the creditor whose actual knowledge is  
17 critical. The answer depends on the effect of the conservatorship  
18 on the Conservatee's status as a creditor under the Bankruptcy  
19 Code.

20 § 101 (10)(A) defines a creditor as an

21 "entity that has a *claim* against the debtor that arose  
22 at the time of or before the order for relief concerning the  
debtor . . . " (emphasis added).

23 An "entity" is defined in § 101(15) as a

24 "person, *estate*, trust, governmental unit, and United  
25 States trustee." (emphasis added).

26 The conservatorship in this case is over Ms. Sobrato's  
27 estate. An estate is an entity under § 101(15). If the  
28 conservatorship is the entity that has a claim against the Debtor,

1 then it is a creditor under § 101(10)(A), and the conservator,  
2 must have had actual knowledge of the case under § 523(a)(3)(B).

3 Sections 101(5)(A) and (B) generally define a claim as any  
4 right to payment, or an equitable remedy for breach of performance  
5 if the breach gives rise to a right to payment. The Bankruptcy  
6 Code is silent, however, on the issue of who has a claim when a  
7 state court orders a conservatorship over the estate of party who  
8 had contracted with a Debtor prior to the Debtor's bankruptcy.

9 "When the Bankruptcy Code is silent, and no uniform bankruptcy  
10 rule is required, the rights of the parties are governed by the  
11 underlying nonbankruptcy law." Klein v. Deicas (In re Klein), 137  
12 B.R. 51, 54 (Bankr. S.D. Cal. 1992) citing, Butner v. United  
13 States, 440 U.S. 48, 55, 99 S.Ct. 914, 918, 59 L.Ed.2d 136 (1979).  
14 Accordingly, the court looks to California Conservatorship law.<sup>6</sup>

15 Cal.Prob.Code § 1872 states that:

16 "(a) Except as otherwise provided in this article,  
17 the appointment of a conservator of the estate is an  
18 adjudication that the conservatee lacks the legal  
19 capacity to enter into or make any transaction that  
20 binds or obligates the conservatorship estate."  
21 (emphasis added).

22 Cal.Prob.Code § 1870 gives a very broad definition of  
23 transaction. That section provides as follows.

24 "As used in this article, unless the context otherwise  
25 requires, transaction includes, but is not limited to, making  
26 a contract, sale, transfer, or conveyance, incurring a debt  
27 or encumbering property, delegating a power, and waiving a  
28 right."

29 The parties have not cited, nor has the court found  
30 California case law directly on point. However O'Brien v.  
31 Dudenhoeffer, 16 Cal.App.4th 327, 335, 19 Cal.Rptr.2d 826, 831  
32 (1993), cited by the Defendant, is instructive. In that case the

1 court held that an order appointing a temporary conservatorship  
2 was an adjudication that the conservatee lacked capacity to give  
3 away her property. Id. at 335. While the precise holding of this  
4 case (power and authority in a temporary conservatorship) is  
5 inapplicable here, the court gave a detailed summary of the  
6 statutory history of California conservatorship law and the  
7 interrelationship between Cal.Prob.Code §§ 1872 and 1870. The  
8 court eventually reasoned that giving away property was a  
9 transaction which, because of the conservatorship, the conservatee  
10 lacked the capacity to carry out.

11 The court finds in this case that the order of  
12 conservatorship read in conjunction with Cal.Prob.Code § 1872,  
13 supports the conclusion that the Conservatee lacked the capacity  
14 to file a nondischargeability complaint, regardless of whether she  
15 had actual knowledge of the Debtor's bankruptcy and regardless of  
16 the fact that the commencement of the conservatorship was a  
17 voluntary act by Ms. Sobrato. Filing a nondischargeability  
18 complaint is a transaction that would either bind or obligate the  
19 conservatorship estate. Because of this incapacity only the  
20 conservator would be the person who could complete this  
21 transaction. Therefore, he was the creditor as that term is  
22 defined in the Bankruptcy Code and, as such, under § 523(a)(3)(B)  
23 he must have had notice or actual knowledge of the Debtor's  
24 bankruptcy in time to file a nondischargeability complaint. The  
25 court also finds that because the term transaction under  
26 Cal.Prob.Code § 1870 includes waiving a right, once the original  
27 conservator was appointed, the Conservatee also lacked the  
28 capacity to waive any rights she may have had with respect to the

1 Debtor's bankruptcy, or the undertaking.

2       Moreover, the order of conservatorship also supports this  
3 conclusion. The conservatorship did not encompass the entire  
4 estate of the Conservatee, but it did give the Conservator the  
5 power to " . . . pay, collect, compromise, arbitrate, or otherwise  
6 adjust claims, debts, or demands upon . . ." the conservatorship.  
7 It also gave the conservator the power to hire attorneys. In  
8 addition, the estate included five specific causes of action as  
9 well as the authority to prosecute or defend " . . . any other  
10 legal action commenced during the conservatorship . . . ."

11       While it is true that five items were specifically excluded  
12 from the conservatorship estate,<sup>7</sup> these items, unlike those  
13 delegated to the conservator, are not related to prosecuting or  
14 defending legal actions. Except for the management of the Menlo  
15 Park apartment house, the items reserved to Ms. Sobrato appear to  
16 be personal, nonbusiness matters. There is nothing to suggest  
17 that she, instead of the conservator, would be responsible for  
18 legal matters such as those that eventually occurred in the state  
19 court involving the O'Donnells and the Debtor. Thus, consistent  
20 with the conservatorship order, any nondischargeability actions  
21 were within the conservatorship estate such that the conservator  
22 would be responsible for their prosecution. Accordingly, he was  
23 the creditor entitled to notice.

24       The court is mindful of the Debtor's contention that allowing  
25 the Defendant to prosecute the fraud claims after the bar date in  
26 this case would offend the "fresh start" policy of the Bankruptcy  
27 Code. However, given that the Debtor will still have an  
28 opportunity to defeat such claims, and the State of California's

1 interest in protecting those who are in need of a conservatorship,  
2 the court finds that, on balance, the Defendant must prevail at  
3 this point.

4 **V. Conclusion**

5 In accordance with the above, the court is prepared to grant  
6 Defendant's motion for summary judgment, in part. Before entering  
7 an order to that effect, however, the remaining issues concerning  
8 the nonfraud claims and the claim of privilege must be resolved.  
9 To that end the court will conduct a status conference on April  
10 16, 1999 at 11:00 a.m. Counsel should not file any additional  
11 papers before the conference. If the scheduled date and time are  
12 inconvenient, counsel may contact Ms. Virginia Belli (415-268-  
13 2323) to set a different time and date for the conference.

14 Dated: March 29, 1999

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Dennis Montali  
United States Bankruptcy Judge

17  
18 1. Unless otherwise indicated, all statutory section references  
are to the Bankruptcy Code, 11 U.S.C. §§ 101 et seq.

19 2. The aspect of Defendant's motion dealt with in this Memorandum  
20 Decision is based on § 523(a)(3)(B), those claims in the state  
21 court action that, if proved, would have been excepted from  
discharge under either §§ 523(a)(2), (4) or (6). In this decision  
these claims will be referred to as the "fraud" claims.

22 The remaining claim(s) in the state court action are for  
23 reimbursement of sums paid and costs incurred by a surety pursuant  
to Cal.Civ.Code § 2847, and will be referred to as the "nonfraud"  
24 claims. These are claims that are nondischargeable under  
§ 523(a)(3)(A) unless the unscheduled creditor had knowledge of  
25 Debtor's bankruptcy in time to file a proof of claim.

26 3. Defendant still must prove those fraud claims.

27 4. For purposes of this decision the court will assume that these  
28 communications actually occurred. The court notes that Defendant  
maintains that these communications never took place. In view of

1 the decision reached here, whether or not they took place is  
2 irrelevant.

3 5. If Conservatee's knowledge is sufficient to discharge the fraud  
4 claims, it follows that such knowledge would also be sufficient to  
5 discharge the nonfraud claims.

6 6. The California Guardianship-Conservator statutes are found in  
7 division 4 of the Probate Code, § 1400 et seq.

8 7. These items were: (1) a Bank of America commercial bank  
9 account (2) a savings account at the same bank; (2) a Merrill  
10 Lynch securities account; (4) a Menlo Park, California, apartment  
11 house; and (5) an Atherton, California, residence.  
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